

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

CLINTONVILLE COMMUNITY MARKET

Employer

and

Case 9-RC-18207

UNITED FOOD & COMMERCIAL WORKERS UNION,
LOCAL 1059, AFL-CIO

Petitioner

REGIONAL DIRECTOR'S DECISION AND
DIRECTION OF ELECTION

I. INTRODUCTION

The Employer is engaged in the retail sale of groceries in the Columbus, Ohio area. The parties agree that a unit consisting of all full-time, regular part-time and fill-in hourly employees employed by the Employer at its Columbus, Ohio facility, excluding confidential/financial employees, clerical employees, human resource employees, managers, assistant managers and all professional employees, guards and supervisors as defined by the Act is appropriate. There are approximately 25 employees in the unit.

The sole disagreement between the parties is whether to include Persons in Charge (PICs) Erin Publow and Ben Price, Deli Director John Liuzza and Produce Director Robert Jones in the bargaining unit. The Employer, contrary to the Petitioner, contends that these individuals are statutory supervisors. As set forth in detail below, I have determined that the PICs, Deli Director, and Produce Director are not supervisors within the meaning of Section 2(11) of the Act as the evidence does not establish that they have any indicia of supervisory authority.

In reaching my determination on this issue, I have considered the record evidence as a whole, as well as the arguments made by the parties at the hearing and in their post-hearing briefs. In explaining how I came to my determination on this issue, I will first describe the Employer's operations, then set forth the applicable legal precedent, and finally analyze the supervisory issue in relation to that precedent. Before beginning my analysis, I note that there is no history of collective bargaining affecting any of the employees involved in this proceeding and that the Petitioner has agreed to proceed to an election in any unit found appropriate.

II. FACTUAL OVERVIEW

A. The Employer's Operations and Workforce:

The Employer, a natural foods cooperative grocery in Clintonville, Ohio, is owned by over a thousand member-owners, but serves both members and the general public. The Employer began operations on January 1, 1997. The store is open to the public from 7 a.m. to 10 p.m. Monday through Saturday and from 8 a.m. to 10 p.m. on Sunday. Employees have access to the store 10 minutes before it opens to the public and must leave 15 minutes after it closes to the public.

The Employer's highest ranking officials are General Manager Edward Bain and Finance Director Carmen Combs, who have responsibilities over different aspects of the operation. Combs has authority over the cash office personnel and cashiers and Bain is in charge of the rest of the operation. Second in command to Bain is Assistant Manager Steven Wolfson, who also serves as the Grocery Receiving Director. Reporting to Wolfson is HR Director Gwen Uetrecht and below Uetrecht are Persons In Charge Erin Publow and Ben Price. According to the Employer's organizational chart, below Publow and Price are Deli Director John Liuzza, Produce Director Robert Jones, and Newsletter/Marketing Director Amanda Bell. Four deli clerks are listed below Liuzza and a "Produce Second" (a job title) and two other produce clerks are below Jones.

The parties have stipulated that any finding regarding the supervisory status of PICs Publow and Price should be the same. The parties have further stipulated that the supervisory status of Deli Director Liuzza and Produce Director Jones should also be the same.

B. The Duties and Responsibilities of Persons in Charge Publow and Price:

The Columbus Public Health Department requires that a "person in charge," who is trained in food compliance law, be present in a food establishment at all times. Like certain other store personnel, Publow and Price have taken the Public Health Department's PIC training which enables the PICs to intelligently discuss food safety issues with government inspectors who inspect the facility and to sign inspection reports on behalf of the employer. Despite the fact that various store personnel have taken the required PIC training, Publow and Price are the only store personnel who have the job title of "Person In Charge". In addition to serving as PICs, Publow and Price work as cashiers or stock groceries. There is no time when they are assigned to perform strictly PIC duties and they do not leave their other duties to monitor the store. The PICs spend all of their working time on the floor and none in an office. The PICs are the highest ranking employees in the store when the management personnel are absent from the store – generally after about 5 p.m., at the earliest, on week nights and on portions of Saturdays and Sundays.

PICs Publow and Price monitor employee attendance by reporting employees who are more than 10 minutes late to management and documenting the employees' explanation for their tardiness. However, the PICs do not actively monitor the employees' time clock. Rather, employees are expected to self-report their tardiness to the PICs. The PICs do not discipline employees because of their attendance. Management has full discretion regarding how and when to discipline employees for attendance issues. A correlation does not exist between a certain

number of attendance infractions and the level of discipline to be imposed. Employees advise the PICs before they take their breaks, but the only requirement that Publow is aware of in this regard is that there must be at least two employees in the store capable of performing the cashier function at all times. Publow testified that if an employee requested to take a break at a time when doing so would leave the store without two cashiers, she would ask the employee to wait. Although General Manager Bain testified that a PIC has the authority to decide whether to warn or write up an employee who over-extends his or her break, he acknowledged that no one has ever been written up by a PIC for this infraction. There is no evidence in the record that the PICs have been told they have this authority.

Bain also testified that PICs can release employees from work early, but they seldom actually do this, primarily releasing only employees who are sick. Publow testified that Bain has told her that employees should never go home for lack of work because there is always something else that could be done around the store. Despite this, Publow testified that she did not believe she actually had any authority to prevent an employee from leaving. On one occasion, when it was anticipated that a supply truck would arrive late, Price asked an employee to stay past his normal quitting time. However, this was only done after Price consulted with Bain about how to deal with the situation and Bain told him that he could ask someone to stay late. It is clear that the employee in question was requested to stay late, not ordered to do so, and that Price felt it necessary to consult with Bain before he asked the employee to stay. The record is unclear whether the PICs have independent authority to authorize work which would necessitate overtime pay. Although Bain testified that they have this authority, he could think of no examples where it actually happened. Further, Publow testified that she did not believe she had the authority to ask someone to stay if it would result in overtime. Indeed the record reflects that if the store is understaffed, the PICs have a list of employees that they can use to call and request employees to work provided it does not result in overtime.

Bain testified about Publow authorizing extra work for an employee. However, his testimony was vague and he acknowledged that he was unsure of the specific circumstances surrounding those situations. In response to a leading question, Bain testified that PICs can transfer employees around the store as needed but Publow denied having any such authority. Publow, who works as a cashier, suggested to management that additional cashiers be assigned to work on the first Monday of the month when there are more sales and this suggestion was effectuated. However, the record does not indicate whether Publow's suggestion was effectuated without any other action by the Employer or that she had any role in determining which cashier or how many cashiers would be assigned to work.

The PIC job description notes that PICs have a responsibility to oversee operations of the store when management is absent, keep others on task and to support and guide the staff. However, PICs are not evaluated, based on the actions of other employees. Publow testified that she answers questions posed by her fellow employees, but noted that any employee would do this. All customers and employees, including the PICs can nominate employees for recognition as "star performers" by placing their names on a board for special recognition. Placement on the "star performer" board is considered its own reward and does not result in any other recognition or a monetary award. Lastly, the record does not reflect that when PICs "oversee" they are required to utilize independent judgment in the assignment of work or that they responsibly direct other employees.

PICs carry keys to the store and are “responsible” for closing the store at night. To do this, they follow a checklist which includes responsibilities such as locking the doors, refrigerating produce and depositing money in a safe. A team of two to three employees closes the store at night. However, the record does not reflect whether the PIC exercise any independent authority over those other employees and to what degree are they responsible for how those employees perform the task of “closing” the store.

The PICs have made suggestions to the Employer such as creating an employee communication log and a bread book and those suggestions were adopted. Publow has been instrumental in implementing safety procedures such as how to react to an armed robbery and has conducted training on this subject. Unlike other employees, PICs have the authority to approve customer checks from non-members of the co-op. To do this, they follow set procedures regarding criteria such as the size of the check. PICs also verify gift certificates and have responsibilities with regard to credit card transactions such as ensuring that customers are not double charged. Like all employees, PICs are expected to report pilferage, but PICs are entrusted with additional responsibility in this regard. For instance, PICs are responsible for inspecting free items that are given to staff because they are not fit for sale to customers.

C. The Duties and Responsibilities of Deli Director Liuzza and Produce Director Jones:

Bain testified that Deli Director Liuzza spends 99 percent of his work day on the floor, rather than in an office, and performs the same duties as the other deli personnel: making salads, sandwiches, soups, burritos and other items for sale each day. These items are packaged, priced and placed in a self-serve display case for the customers. Deli personnel do not fill specific orders for customers and have very little interaction with customers. The deli employees also prepackage meat for sale, prepare coffee for customers, wash dishes and scrub the sinks.

To prepare the food items for sale in the deli, employees follow recipes found in the Employer’s manuals. They then put price tags on the items and place them in the case for the customers. Liuzza testified that he asks the other deli employees which tasks they want to perform and that he will do whatever tasks remain. For instance, if no one else in the department wants to scrub the sink, Liuzza will do this. Liuzza also testified that he has no recourse if an employee refuses to do something that he asks. Liuzza and the other deli employees jointly decide what products to produce on a given day and in what quantity, primarily based upon what is selling. Liuzza makes the decision regarding which new entrees to produce in the deli, but the process is a collaborative one with other deli employees. Liuzza is responsible for monitoring the inventory and ensuring that expired goods are not sold. When the deli is low on an item, Liuzza fills out an order sheet and gives it to Bain, although the same items are ordered every week. Liuzza once recommended to Bain that the Deli use a new bagel supplier, but this recommendation was not followed.

If a deli department employee does not show up for work, Liuzza calls Bain or Wolfson to see if the employee contacted them. He has no authority to approve an employee’s request for time off. The job description for the deli director reflects that the position is responsible for evaluating deli’s labor needs, operating the deli and guiding the staff. Liuzza testified, however, that he has never been held responsible for the actions of another employee. As an example he described that he was not disciplined for a catering event that was poorly done. Although Liuzza

did not hold the title of Deli Director at that time, Liuzza testified that he was performing the same job duties that he performs now, despite the fact that his title has changed from time to time. Dan Bunner, listed as one of Liuzza's subordinates on the Employer's organizational chart, is responsible for the cheese products of the deli, and testified that Liuzza does not direct his work in any manner.

Liuzza testified that he has made various recommendations to management, but that they are seldom followed. For example, he testified that he has requested that additional employees be scheduled to work on Fridays and Saturdays, but that this recommendation has not been enacted. Liuzza also testified that he has recommended that various employees be hired for the deli, but that recommendation was only followed on one occasion. On this occasion, Vicki Whalen, who was a customer of the store, was initially approached by Bain, who inquired if she was interested in working for the Deli. After she had already completed a successful interview with Bain, Liuzza interviewed her as well. Although Bain testified that Liuzza's favorable opinion regarding Whalen was key to the decision to hire her and that he would not employ a person without Liuzza's direction, Liuzza testified that he viewed the interview as primarily an opportunity to get to know a future co-worker -- not an interview in which he would make the ultimate hiring decision. Liuzza and Whalen only spoke for about five minutes.

Bain testified that he asks Liuzza how deli employees are doing. In this regard, Bain stated that Liuzza's opinion was "key" to his decision to not permit an injured employee to return to work following her injury. The record reflects that Liuzza wrote a statement, at Bain's request, about an employee who allegedly injured her back on the job. While Liuzza acknowledged that he expressed concern about the employee returning to work, he explained that this was a response to Bain's suggestion that the other employees perform duties that the injured employee could not perform and that Liuzza was simply opining that this was not an equitable arrangement. Liuzza testified that the injured employee continued to work in the deli despite his recommendation to the contrary until she left her employment a few weeks later. Bain also testified that because of Liuzza's "negative opinion" of a kitchen employee named Elisabeth Warner he decided not to grant that employee's request for more working hours. Liuzza, however, testified that he merely expressed surprise to Bain that he assigned Warner to the deli since she had no experience and that he did not make any recommendation regarding her work assignment.

Liuzza completed a portion of a written evaluation for Deli employee Whalen; this is the only time that Liuzza performed a written evaluation for any employee. Liuzza testified that he did not sign the evaluation because he believed he was not qualified to evaluate Whalen. Liuzza has also completed "evaluations" for some 14-15 year old student interns, but the review forms are supplied by the students' school -- not the Employer. The students are not paid employees of the Employer and would not be members of the bargaining unit sought by Petitioner in this matter. Evaluations can lead to wage increases, but only Bain makes that decision. Liuzza does not make any recommendation in the evaluation and the record does not reflect how the Employer utilizes these evaluations to effect employees' terms and conditions of employment. Bain testified that on other occasions, Liuzza has recommended pay increases that were not granted. Moreover, Liuzza testified that Bain has stated in employee meetings that he is the only one with authority to grant pay increases.

There is insufficient evidence that Liuzza has any disciplinary authority. Bain opined that Liuzza could send an employee home. However, this has never happened and Bain noted that he (Bain) would maintain “oversight” over any discipline. In addition, Liuzza testified that he has never been informed that he has any disciplinary authority.

Liuzza is one of several employees certified to be a “person in charge” as that term is defined by the City of Columbus with regard to its food safety procedures, and he has signed inspection reports on behalf of the Employer. Liuzza attends periodic “directors’ meetings” with the other department directors and various members of management. Liuzza described one such meeting where the participants took turns reading a handout with various figures that he did not understand. There was no indication in the record that labor relations matters are discussed in these meetings.

The record contains substantially less testimony about the job duties and responsibilities of Produce Director Robert Jones, but as noted above, the parties have agreed that any finding with regard to the supervisory status of Liuzza should also apply to Jones. The produce department handles all fresh vegetables and fruits that come to the store. Produce personnel receive the products, store them, supply the retail area with fresh products, and maintain the retail area.

The record reflects that Jones, like Liuzza, spends 99 percent of his work time working out on the floor. Bain testified that Jones assigns the work in the produce department and stated that he might leave notes for the produce staff to do things such as stock lettuce. The job description for the produce director indicates that the position oversees and trains the Produce Second, but there was little testimony on this subject. The record, however, does not provide a detailed description of Jones’ duties beyond conclusory statements that Jones assigns work. Jones trains new employees and instructs employees on how to price items and how to use the hand truck.

Lastly, Bain testified that Jones recommended the hiring of Produce Second Paul Touse. However, the record does not provide any details regarding the degree Jones’ participation in the hiring decision or what weight the Employer gave to his recommendation. Like Liuzza, Jones orders products for his department. Jones has never evaluated a fellow employee.

III. ANALYSIS OF THE SUPERVISORY ISSUE

A. The Legal Framework:

Supervisors are specifically excluded from the Act’s definition of “employee” by Section 2(11) of the Act which defines a “supervisor” as:

any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

To meet the definition of a supervisor set forth in Section 2(11) of the Act, a person needs to possess only one of the 12 specific criteria listed, or the authority to effectively recommend such action. *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir. 1949), cert. denied, 338 U.S. 899 (1949). The exercise of that authority, however, must involve the use of independent judgment. *Harborside Healthcare, Inc.*, 330 NLRB 1334 (2000). Thus, the exercise of “supervisory authority” in merely a routine, clerical, perfunctory or sporadic manner does not confer supervisory status. *Chrome Deposit Corp.*, 323 NLRB 961, 963 (1997); *Feralloy West Corp. and Pohng Steel America*, 277 NLRB 1083, 1084 (1985).

Possession of authority consistent with any of the indicia of Section 2(11) is sufficient to establish supervisory status, even if this authority has not yet been exercised. See, e.g., *Pepsi-Cola Co.*, 327 NLRB 1062, 1063 (1999); *Fred Meyer Alaska*, 334 NLRB 646, 649 at fn. 8 (2001). The absence of evidence that such authority has been exercised may, however, be probative of whether such authority exists. See, *Michigan Masonic Home*, 332 NLRB 1409, 1410 (2000); *Chevron U.S.A.*, 308 NLRB 59, 61 (1992).

In considering whether the putative supervisors involved here possess any of the supervisory authority set forth in Section 2(11) of the Act, I am mindful that in enacting this section of the Act, Congress emphasized its intention that only supervisory personnel vested with “genuine management prerogatives” should be considered supervisors, and not “straw bosses, leadmen, set-up men and other minor supervisory employees.” *Chicago Metallic Corp.*, 273 NLRB 1677, 1688 (1985). Thus, the ability to give “some instructions or minor orders to other employees” does not confer supervisory status. *Id.* at 1689. Such “minor supervisory duties” do not deprive such individuals of the benefits of the Act. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-281 (1974), quoting Sen. Rep. No. 105, 80th Cong. 1st Sess., at 4. In this regard, the Board has frequently warned against construing supervisory status too broadly because an individual deemed to be a supervisor loses the protection of the Act. See, e.g., *Oakwood Healthcare, Inc.*, 348 NLRB No. 37, slip op. at 3 (2006); *Vencor Hospital – Los Angeles*, 328 NLRB 1136, 1138 (1999); *Bozeman Deaconess Hospital*, 322 NLRB 1107, 1114 (1997).

Proving supervisory status is the burden of the party asserting that such status exists. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711-712 (2001); *Arlington Masonry Supply*, 339 NLRB 817, 818 (2003); *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003). As a general matter, I note that for a party to satisfy the burden of proving supervisory status, it must do so by “a preponderance of the credible evidence.” *Dean & Deluca*, supra at 1047; *Star Trek: The Experience*, 334 NLRB 246, 251 (2001). The preponderance of the evidence standard requires the trier of fact “to believe that the existence of a fact is more probable than its non-existence before [he] may find in favor of the party who has the burden to persuade the [trier] of the fact’s existence.” *In re Winship*, 397 U.S. 358, 371-372 (1970). Accordingly, any lack of evidence in the record is construed against the party asserting supervisory status. See, *Williamette Industries, Inc.*, 336 NLRB 743 (2001); *Michigan Masonic Home*, 332 NLRB at 1409. Moreover, “[w]henver the evidence is in conflict or otherwise inconclusive on a particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia.” *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Consequently, mere inferences or conclusionary statements without detailed specific evidence of independent judgment are insufficient to establish supervisory status. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991).

The Board revisited the issue of supervisory status in *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006), in light of the Supreme Court's finding in *Kentucky River*. See also, *Croft Metals, Inc.*, 348 NLRB No. 38 (2006) and *Goldencrest Healthcare Center*, 348 NLRB No. 39 (2006), issued at the same time as *Oakwood*. In *Oakwood*, the Board addressed the Supreme Court's rejection of the Board's interpretation of Section 2(11) in the healthcare industry as being overly narrow and adopted "definitions for the term 'assign,' 'responsibly to direct,' and 'independent judgment' as those terms are used in Section 2(11) of the Act." *Oakwood*, supra, slip op. at 3.

With regard to the Section 2(11) criterion "assign," the Board considered that this factor shares with other Section 2(11) criteria the "common trait of affecting a term or condition of employment" and determined to construe the term "assign" "to refer to the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee." *Id.*, slip op. at 4. The Board reasoned that, "It follows that the decision or effective recommendation to affect one of these – place, time, or overall tasks – can be a supervisory function." *Id.* The Board clarified that, "... choosing the order in which the employee will perform discrete tasks within those assignments (e.g., restocking toasters before coffeemakers) would not be indicative of exercising the authority to 'assign.'" *Id.*

In *Oakwood*, the Board explained that, "responsible direction," in contrast to "assignment," can involve the delegation of discrete tasks as opposed to overall duties. 348 NLRB at slip op. 5-6. The Board reasoned, however that "for direction to be 'responsible,' the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employees are not performed properly." In clarifying the accountability element for "responsibly to direct" the Board noted that, "to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps." *Id.*, at slip op. 7.

Assignment or responsible direction will, as noted above, produce a finding of supervisory status only if the exercise of independent judgment is involved. Independent judgment will be found where the alleged supervisor acts free from the control of others, is required to form an opinion by discerning and comparing data, and makes a decision not dictated by circumstances or company policy. *Id.* at slip op. 8. Independent judgment requires that the decision "rise above the merely routine or clerical." *Ibid.*

Based on the record evidence as discussed below, I find that the PICs, Deli Director and Produce Director are not statutory supervisors.

B. The PICs:

1. *The evidence does not establish that the PICs can hire, transfer, suspend, lay off, recall, promote, discharge, reward, or discipline other employees or adjust their grievances or effectively recommend such actions.*

It is well settled that the authority to discipline must be established by a showing that the putative supervisor's participation in the disciplinary process leads to a personnel action without independent review or investigation by other managerial or supervisory personnel. *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002), citing *Beverly Health and Rehabilitation Services, Inc.*, 335 NLRB 635 (2001). The Board has repeatedly held that the mere exercise of a reporting function that does not automatically lead to further discipline or adverse action against the employee does not establish supervisory authority. See, *Illinois Veterans Home At Anna L.P.*, 323 NLRB 890 (1997); *Ten Broeck Commons*, 320 NLRB 806 at 812 (1996). Although the PICs monitor employee attendance, they do not impose or recommend any discipline for infractions. They merely advise management whenever an employee is more than 10 minutes late and management decides what level of discipline to impose, if any. This monitoring function is clearly not disciplinary authority as contemplated by Section 2(11) of the Act.

2. *The PICs do not assign work within the meaning of Section 2(11) of the Act.*

The record revealed only one example when a PIC asked an employee to stay beyond his normal shift – when a supply truck was scheduled to arrive late. This was clearly in the nature of a request, not an order, and the request was only made after the PIC consulted with Bain. No examples were provided of a situation where a PIC ordered an employee to stay past his normal shift. Under the circumstances, it has not been established that the PICs have the independent authority to assign overtime or effectively recommend the assignment of overtime within the meaning of Section 2(11) of the Act. See, e.g., *Golden Crest Healthcare Center*, supra, slip op. at 4 - 5 (2006) (charge nurses requesting that CNAs stay past the end of their shift does not establish that they can assign employees to work overtime).

Although the PICs may have some limited authority to release employees from work in the evening, this appears to be limited to situations where the employees are sick. It is significant that Publow does not believe she has any authority to prevent an employee from leaving. PICs can call employees if they are understaffed, but they simply go down a list and request employees to come in. The record does not support the conclusion that the PICs exercise any independent judgment in performing this function. The Board has held that the authority to release employees from work early on request or to request, but not require, employees to stay late does not confer supervisory authority. *Azusa Ranch Market*, 321 NLRB 811, 812 (1996). Equally unpersuasive is the Employer's contention that the PICs' authority to prevent employees from taking breaks at times when this would leave the store without two cashiers somehow bestows upon them supervisory authority. The Board has held that the authority to prevent employees from taking breaks when the store is busy does not make one a supervisor. *Azusa Ranch Market*, supra at 812. Publow's suggestion that additional cashiers be assigned when the store is busy is not different in kind or character from any other suggestion that an employee might make to management to alleviate her work burden at times when the store is busy and certainly does not suggest supervisory authority. In this regard, there is likely an element of self-interest involved when a cashier such as Publow suggests that additional cashiers be assigned to work during peak hours.

3. *The PICs do not responsibly direct other employees within the meaning of Section 2(11) of the Act.*

There is very little evidence in the record that the PICs provide direction of other employees in their work. Although the PIC job description provides that PICs are responsible for keeping employees on task, directives to putative supervisors setting forth supervisory authority is not determinative of their supervisory status. *Connecticut Light & Power Co.*, 121 NLRB 768, 770 (1958). Even should I find that this vague language in the job description somehow suggest that PICs provide significant direction, there is no evidence that they responsibly direct employees within the meaning of Section 2(11) of the Act. As touched upon previously, in *Oakwood Healthcare*, the Board interpreted the phrase “responsibly to direct” as follows: “If a person on the shop floor has men under him, and if that person decides what job shall be undertaken next or who shall do it, that person is a supervisor, provided that the direction is both ‘responsible’ (as explained below) and carried out with independent judgment.” *Oakwood Healthcare*, supra, slip op. at 6 (internal quotations omitted). The Board then held that for direction to be “responsible,” the person directing the performance of a task must be accountable for its performance. Id. slip op. at 6-7. Further, the Board held that to establish accountability, “it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It must also be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.” Id. at 7. There was no evidence in the record that PICs are held responsible for the actions of other employees.

Although there are times when the PICs are the highest ranking employees in the store, this does not confer supervisory status. In this regard, it is significant that the Employer is a small natural foods grocery store – not a public utility or a ship. Accord *Maine Yankee Atomic Power Co. v. NLRB*, 624 F.2d 347 (1st Cir. 1980); *American River Transp. Co.*, 347 NLRB No. 93 (2006). The Board has held that being the highest ranking employee in a grocery store for several hours at night does not make one a supervisor. *Azusa Ranch Market*, supra. At the close of the shift, when there are two to three employees left in the store, the PICs use a check list to ensure that the store is properly closed down and that the doors are locked. No independent judgment is exercised here and there is no basis in the record to conclude that a PIC would be held responsible for another employee’s failings in this regard. Although the PICs provide some direction to other employees by answering questions based on their experience, it has not been established that they have been given the authority to take corrective action if their directions are not followed nor has it been shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps. See, *Armstrong Machine Co.*, 343 NLRB 1149 (2004) (holding that a senior employee who answered questions from other employees was not a supervisor). Thus, it has not been shown that PICs responsibly direct other employees within the meaning of the Act. See, e.g., *Lynwood Manor*, 350 NLRB No. 44, (2007) (employer failed to show that RN/LPNs were accountable for their actions in directing the CNAs, since there was no evidence showing that RN/LPNs could be disciplined, receive a poor performance rating, or suffer any adverse consequences in their terms of employment due to a failure in a CNA's performance of routine functions).

Finally, the Employer in its brief argues that the PICs are supervisors because they are the “safety supervisor,” establish and monitor a log book for better communication between management and (sic) employees “they can call-in, retain and transfer employees,” “authorize checks, money orders, ect. for cashiers,” and attend management meetings where they receive “confidential information.” Initially, I note that with regard to being a “Safety Supervisor,” the

title itself is not dispositive of supervisory status but a merely secondary indicia of supervisory status. See, *John N. Hansen Co., Inc.*, 293 NLRB 63 (1989). Similarly, the PIC's responsibilities to monitor the communications "logbook" and authorize checks and money orders for customers does not establish their supervisory status or otherwise warrant their exclusion from the unit as managerial employees. See, *Gibson Discount Center*, 191 NLRB 622 (1971). Regarding PICs attendance of management meetings, this too is a secondary indicia of supervisory status and there is no evidence that personnel matters or other issues relating to supervising a department were discussed at any of these meetings. See, *Dean & Deluca New York, Inc.*, 338 NLRB 1046 (2003) and *Auto West Toyota*, 284 NLRB 659 (1987). Lastly, with regard to the Employer's connection that the PICs have the authority to "call-in, retain and transfer employees." I have already noted herein, and the record reflects, that the authority does not exist or that their authority in this area is limited and does not involve the exercise of any independent judgment.

For the foregoing reasons and based on the record as a whole, I conclude that the Employer has not met its burden of proving that the PICs are supervisors within the meaning of Section 2(11) of the Act. Accordingly I shall include them in the unit.

C. The Deli and Produce Directors:

1. *The evidence does not establish that the Deli and Produce Directors can hire, transfer, suspend, lay off, recall, promote, discharge, reward, or discipline other employees, or adjust their grievances, or effectively to recommend such actions.*

The ability to hire or recommend hiring confers supervisory status only when it is exercised with independent judgment on behalf of management and not in a routine manner. See, *Bowne of Houston*, 280 NLRB 1222, 1223 (1986). An individual who merely advises management about the experience of an applicant does not make hiring decisions or effectively recommend hiring where management also interviews the applicants and has final hiring authority. See, *The Door*, 297 NLRB 601 (1990). The Employer argues that Bain hired employee Whalen because Liuzza approved of her. However, the record reflects that Bain initially recruited Whalen for a job and first interviewed her. See, *Hawaiian Telephone Co.*, 186 NLRB 1 (1970) (supervisory status not shown when recommendations were not shown to be effective or to result in personnel action without resort to investigation by a higher authority). Further, the record reflects that Liuzza only had a brief conversation with Whalen and was under the impression the sole purpose of their meeting was to introduce him to a future co-worker. Although Liuzza was impressed by Ms. Whalen's experience and conveyed his enthusiasm to Bain, Liuzza testified that he has recommended many other employees for the deli and his recommendations have not been taken. While Liuzza's approval of prospective employee Whalen may have been important to Bain's hiring decision, it is clear from the record that the decision was ultimately Bain's. Thus, the situation is dissimilar from the facts presented in *Fred Meyer Alaska, Inc.*, 334 NLRB 646 (2001), where meat and seafood managers routinely hired employees – sometimes before the employees ever met the stores' higher level management. This situation is also distinctly different from *Sheraton Universal Hotel*, 350 NLRB No. 84 (2007), where a front desk supervisor with disciplinary authority and hiring

authority was found to be a supervisor. Similarly, although Bain testified that the Produce Second was hired on the recommendation of Jones, there is very little detail in the record for me to conclude that Jones effectively recommended the hiring. As it is the Employer's burden to establish supervisory status in this matter, I cannot find that the burden has been met under the facts presented.

Although the Employer asserts that Liuzza has the power to send an employee home for disciplinary reasons, Bain testified that he would maintain "oversight." In any event, it is unclear from the record whether Bain was limiting his opinion regarding Liuzza's authority to send employees home to situations involving flagrant rules violations. See, e.g. *Wilshire at Lakewood*, 343 NLRB 141, n. 10 (2004). I also find it significant that Liuzza has never actually disciplined anyone and was of the opinion that he had no authority to do so. The Board has held that individuals must be notified of their authority if they are to be considered supervisors. *Volair Contractors, Inc.*, 341 NLRB 673 (2004). Liuzza acknowledged that he wrote a report about an employee who was injured at work. Although he recommended that the employee not return to the deli, he took this position on behalf of his co-workers, not management, due to the fact that he thought it was unfair for the other deli employees to have to cover for the injured employee. Regardless, Liuzza's suggestion was not followed, as the employee in question did return to work. The Employer has not carried its burden of establishing that Liuzza possesses disciplinary authority.

Although Liuzza partially completed an employee evaluation for Ms. Whalen, he did not recommend any pay increase and he has never evaluated any other employee. From the record, it is clear that pay increases sometimes follow evaluations and sometimes occur independently of evaluations. It is well settled that the authority to evaluate is not an indicia of supervisory authority if the evaluation does not affect employee status or tenure. *Volair Contractors, Inc.*, 341 NLRB 673 (2004); *Williamette Indus.*, 336 NLRB 743 (2001). In the instant case, it appears that Bain, not Liuzza, makes the decision whether to increase an employee's pay. Even if Whalen did get a raise because of Liuzza's favorable evaluation, the Board has held that an isolated incidence of an evaluation resulting in a raise, without more, is not enough to establish supervisory authority. *Highland Telephone Cooperative*, 192 NLRB 1057 (1971).

2. The Deli and Produce Directors do not assign work within the meaning of Section 2(11) of the Act.

With respect to the authority to assign work, while it may be arguable that the deli or produce directors could "assign" an employee a particular task associated with the daily functioning of their respective departments, such as asking someone to make sandwiches or stock lettuce, this is not in the nature of an assignment as contemplated by Section 2(11) of the Act. In this regard it should be noted that the assignment is not the act of designating an employee to a place, appointing an employee to a time, or giving an employee significant overall duties. In the deli, for instance, everyday someone must make coffee, someone must make sandwiches, and someone must wash dishes. The Board has held that grocery store directors who assign routine duties such as stocking shelves, opening registers and sweeping are not statutory supervisors. *Azusa Ranch Market*, supra. In any event, Liuzza testified that the Deli employees jointly decide who will perform what task and that he does whatever the others do not want to do. He further testified that he would have no recourse if an employee refused to do what he asked. The record fails to establish Produce Director Jones' ability to assign work

beyond Bain's conclusory statement that he does so. Under the circumstances, I cannot find that the Deli Director or Produce Director assigns work for purposes of finding that they have statutory supervisory authority.

3. The Deli and Produce Directors do not responsibly direct other employees within the meaning of Section 2(11) of the Act.

As with the PICs, there is very little evidence that the Deli or Produce directors direct other employees and even less evidence that they responsibly direct employees. In this regard, there are certain routines that the Deli employees go through on a daily basis and that these routines vary little from day to day. The employees know what is to be done and decide amongst themselves what tasks they will perform. Moreover, there is no evidence that Liuzza or Jones have ever been held accountable for the successes or failures of their purported subordinates or have been told that they are accountable. Indeed, Liuzza gave a specific example of a catering event which went poorly, but he was not held accountable.

With regard to the fact that Liuzza occasionally attends directors' meetings, it is well settled that the fact that an individual may attend management meetings is a secondary indicator of supervisory authority and is insufficient to establish such authority. *Dean & Deluca New York, Inc.*, 338 NLRB 1046 (2003). In any event, Liuzza's characterization of the meeting as one in which the managers took turns reading from handouts with various figures in them, does not suggest any conflict with the intent of the Act to separate the functions of management from those of labor. For the forgoing reasons and based on the record as a whole, I conclude that the Employer has not met its burden of proving that the Deli and Produce Directors are supervisors within the meaning of Section 2(11) of the Act and I shall include them in the unit found appropriate.

The Employer further argues that Deli Director determine "the work necessary" for the deli operation. This apparently includes determining the items to produce in the deli for sale and instructs employees on how to correctly perform their jobs. However, determining which foods to prepare for sale to the public is not indicia of supervisory status because it has no direct impact on employees terms and conditions of employment. Further, the fact that the deli director may instruct employees on how to perform a discrete task without more is insufficient to establish supervisory status.

IV. EXCLUSIONS

In accord with the stipulation of the parties and based on the record as a whole, I find that General Manager Edward Bain, Assistant Manager Steven Wolfson, Newsletter/Marketing Director Amanda Bell, Finance Director Carmen Combs and HR/Office Administration /Cash Office Gwen Uetrecht are supervisors within the meaning of Section 2(11) of the Act. Accordingly, I shall exclude them from the unit found appropriate herein.

V. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the above-referenced narrative, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
4. The Petitioner claims to represent certain employees of the Employer.
5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
6. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time, regular part-time and fill-in hourly employees employed by the Employer at its Columbus, Ohio facility, including the produce director, the deli director and the persons in charge, but excluding confidential/financial employees, clerical employees, human resource employees, managers, assistant managers and all professional employees, guards and supervisors as defined by the Act

VI. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote on whether they wish to be represented for purposes of collective bargaining by United Food & Commercial Workers Union, Local 1059, AFL-CIO. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility:

Eligible to vote in the election are those employees in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible to vote are all employees in the unit who regularly averaged 4 or more hours of work per week for the last quarter prior to the eligibility date. *Davison-Paxon Co.*, 185 NLRB 21 (1970). Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are: (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters:

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before **April 23, 2008**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency website, www.nlr.gov, ^[1] by mail, or by facsimile transmission at (513) 684-3946. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **two** copies of the list, unless the list is submitted by facsimile or electronically, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations:

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

VII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received in Washington by **April 30, 2008**. The request may be filed electronically through E-Gov on the Board's web site, www.nlr.gov, ^[2] but may not be filed by facsimile.

DATED: April 16, 2008

/s/ Gary W. Muffley, Regional Director

Gary W. Muffley, Regional Director
Region 9, National Labor Relations Board
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271

Classification Index

177-8520-0800
177-8520-1600
177-8520-2400
177-8520-3200
177-8520-4700

^[1] To file the list electronically, go to www.nlr.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Regional, Subregional and Resident Offices** and click on the "File Documents" button under that heading. A page then appears describing the E-filing terms. At the bottom of this page, the user must check the box next to the statement indicating that the user has read and accepts the E-Filing terms and then click the "Accept" button. The user then completes a form with information such as the case name and number, attaches the document containing the request for review, and clicks the Submit Form button. Guidance for E-Filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Board's website, www.nlr.gov.

^[2] Electronically filing a request for review is similar to the process described above for electronically filing the eligibility list, except that on the E-Filing page the user should select the option to file documents with the **Board/Office of the Executive Secretary**.